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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

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5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE JENNIFER C. BOAL

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 17
One Courthouse Way
Boston, MA 02210

June 22, 2016
11:35 a.m.

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on June 22, 2016.)

COURTROOM DEPUTY CLERK YORK: Will counsel in the courtroom please identify themselves for the record.

MS. JOHNSON: Good morning, your Honor. Kirsten Johnson for the plaintiffs.

MR. STRANCH: Good morning, your Honor. Gerard Stranch for the PSC.

MR. TARDIO: Chris Tardio and Matt Cline for the Specialty Surgery Center defendants.

MR. KRAUSE: Kent Krause on behalf of the Specialty Surgery Center and Dr. Lister.

THE COURT: Good morning, everyone. And I think we have some folks on the phone as well.

UNIDENTIFIED SPEAKER: Yes, your Honor. Good morning.

COURTROOM DEPUTY CLERK YORK: Please identify yourself for the record.

MS. HURT: Rachel Hurt and Paul Wehmeier from my office.

COURTROOM DEPUTY CLERK YORK: And, Ms. Wilson, can

1 you please identify yourself for the record.

2 (No response.)

3 COURTROOM DEPUTY YORK: Hello?

4 MS. WILSON: Ashley Wilson from Mark Dancer's office,
5 your Honor. I'm sorry, I thought I was on mute.

6 THE COURT: Good afternoon, everyone.

7 So, we have dueling motions. I'll hear from the
8 plaintiffs first.

9 MR. STRANCH: Thank you, your Honor. Gerard Stranch
10 on behalf of the Plaintiffs' Steering Committee.

11 THE COURT: I think you actually have to move the
12 microphone even closer.

13 MR. STRANCH: Even closer. Normally I'm a little too
14 loud as opposed to a little too quiet. So, I apologize.

15 Your Honor, this all surrounds, as we laid out in the
16 papers, the computers that were sold by Specialty Surgery to
17 Cumberland Medical Center.

18 The Court has already ruled on multiple discovery
19 motions in this case compelling certain things to be produced.
20 I'm not going to get into that whole background. I'm sure the
21 Court is painfully aware of everything that's gone on to this
22 point.

23 And so, what this comes down to is we have agreed
24 with Cumberland Medical Center that we're going to have a
25 third party search the hard drives on these computers and

1 produce the documents to us. We agreed on a protocol. We
2 agreed on a review procedure with Cumberland Medical. There
3 is no dispute that these computers belong to Cumberland
4 Medical Center.

5 And so, what's happened is the Specialty Surgery
6 defendants have filed an objection asking that they be allowed
7 to do a privilege review before we receive the documents as
8 well.

9 THE COURT: And my understanding under the PSC's
10 proposal -- or the joint proposal with Cumberland is that
11 Cumberland would have the ability to do a screening of the
12 materials before they're turned over to the PSC.

13 MR. STRANCH: That is correct.

14 And so, there's really three things and it's kind of
15 a cascading thing. So, the first issue that the Court would
16 need to address has not really been briefed by the defendants,
17 which is, is Cumberland Medical Center a successor to
18 Specialty Surgery. If Cumberland Medical is a successor -- a
19 legal successor to Specialty Surgery, then there is no need to
20 go any further and Specialty Surgery gets the right to do the
21 privilege review. We've laid that out.

22 Neither Cumberland Medical Center or Specialty
23 Surgery has taken a position on that. We've asked multiple
24 times. We believe they may be the successor, but they refuse
25 to say yes or no. So, unless they want to take a position on

1 that here today, then we'll need to move on to the second
2 issue and leave that decision for later briefing.

3 THE COURT: I'm sorry. So, you're saying because we
4 have the stock -- I think it's the stock purchase agreement,
5 and you're correct that at least -- I don't know Tennessee law
6 as well, but under Massachusetts law, it may well have been
7 construed that Cumberland was a successor to Specialty
8 Surgery.

9 MR. STRANCH: That is correct. And that is what we
10 believe, and we'll brief that later at the appropriate time if
11 they're not willing to concede or agree to that today.

12 THE COURT: And then you're saying -- I may have
13 misheard you. If Cumberland is a successor, you're saying
14 that Specialty Surgery would have the right or would not have
15 the right?

16 MR. STRANCH: They would have the right.

17 THE COURT: Would have the right, okay.

18 MR. STRANCH: In all candor, that would end the
19 negotiation and they would have the right, but they would need
20 to stand up and say that, yes, they are the successor.

21 MS. HURT: Your Honor, this is Rachel Hurt on behalf
22 of Cumberland Medical Center.

23 THE COURT: So, Ms. Hurt, what I would ask you to do
24 is just wait. I will certainly give you the opportunity to
25 speak, but I'll hear from the plaintiffs and SSC and then I

1 will ask for your input at that time.

2 MR. STRANCH: Your Honor, so the next step that the
3 Court would need to look at is whether there has been a
4 voluntary waiver by selling the computers and the materials to
5 Cumberland Medical Center.

6 So, if we go back to Black Letter Law from law
7 school, where we talk about attorney/client privilege, you'll
8 recall that one of the big things you can't do is share it
9 with third parties not within the attorney/client
10 relationship. We've read all those cases from law school
11 about a lawyer talking with their client on the bus and
12 waiving the privilege as a result of that, or in a restaurant
13 because other people were able to hear it.

14 So, the question here is: By selling those computers
15 in fee simple without any rights reserved or withheld, did
16 Specialty Surgery waive the attorney/client privilege? We
17 believe they did. The *Stokesbury* and the *Solis* cases are
18 directly on point. They involve a sale of a computer or
19 computers to a third party that was not involved in the
20 litigation, and that third party, by virtue of receiving it,
21 the courts both times found that there was a complete and
22 unequivocal waiver of the attorney/client and other privileges
23 as a result because it went outside the attorney/client
24 relationship.

25 And in this case it was a fee simple sale. It was

1 bargained for, subject to much negotiations. Cumberland
2 Medical Center continued to operate the clinic after this --
3 after the sale. They needed access to the data on those
4 computers. They put some of the computers into use and
5 accessed and used them. And so, it is clear that there has
6 been an absolute and complete waiver of any privilege as a
7 result of that transfer, a voluntary waiver.

8 This was not an inadvertent waiver. This was not a
9 we didn't realize what we were doing. These were the only
10 computers in the place. These were the computers that the
11 emails were contained upon and other documents related to.
12 There was no effort to wipe the computers before the sale.
13 There was no effort to delete any attorney/client privileged
14 information on there. It was just handed over.

15 THE COURT: Now, I think the SSC folks would say that
16 it was all password protected. So, why doesn't that change
17 the calculus?

18 MR. STRANCH: Well, it doesn't matter for the
19 voluntary waiver because it's given to a third party, but,
20 your Honor, even if they say it's password protected, what
21 they don't say in any of their declarations that were filed
22 last night is that they didn't provide the passwords to
23 Cumberland Medical, because we know those computers were put
24 into service at Cumberland Medical. They've acknowledged
25 that.

1 And, furthermore, we all know a simple password on a
2 computer with an administrator log-in, you can reset that
3 password and start using and access all the data. There's no
4 mention of encryption to prevent that from occurring. There's
5 no mention of any other steps that were taken, but that's
6 really on the inadvertent disclosure side if you find there
7 was no voluntary waiver.

8 We believe that it is very clear that there was a
9 voluntary waiver, and in support of that, CMC has stated that
10 in their review of the computers, they have found some
11 documents that, arguably, could be attorney/client privileged,
12 which means whatever protections they put in place were
13 insufficient to stop a lawyer from being able to access them
14 and see what's there. So, that privilege has clearly and
15 unequivocally been raised, as is mentioned in the *Stokesbury*
16 and the *Solis* cases.

17 We also within our brief cite to numerous other court
18 cases across the country under similar circumstances where it
19 was found to be a complete voluntary waiver.

20 The defendants push to the Court a concept of
21 inadvertent disclosure, claiming that it was inadvertent.
22 First of all, inadvertent disclosure as a rule applies to when
23 an attorney accidentally turns over something. For example,
24 you grab a stack of documents to produce in discovery and you
25 accidentally grab one that was attorney/client privileged, you

1 know, or you accidentally attach the wrong document when
2 you're sending an email to opposing counsel. That's what
3 inadvertent disclosure is intended to encompass, not an
4 intentional bargained-for sale that took place over a number
5 of years of bargaining and ceases between bargaining, then
6 bargaining again and a sale. That is not an inadvertent
7 disclosure. That is a client making a calculated decision to
8 sell all their product, including their attorney/client
9 privileged documents, to a third party.

10 But even if we go into the inadvertent disclosures,
11 what we see here is the only thing that they attach any
12 significance to -- and this is, again, their burden to prove
13 it wasn't a voluntary disclosure. It wasn't an inadvertent
14 disclosure, their burden. The only thing they point to is
15 this idea that there were passwords on the computers.

16 Well, we all have log-ins that you have to have to
17 access your computer. That is not a great protection.
18 There's no encryption that they used, and they don't deny that
19 they provided the passwords to CMC, and if they didn't provide
20 the passwords to CMC, they should have said that, because it's
21 their burden to carry to prove that they didn't inadvertently
22 disclose.

23 But if we think about this from a logical point of
24 view, your Honor, why would CMC bargain for and buy a computer
25 that they wouldn't be allowed to use because a password is on

1 it? That would be wasted money. They bought it because they
2 intended to use it and because they needed the historical
3 records on there if certain issues arose.

4 It was important to Cumberland Medical Center to have
5 that, to have the continuity of care for the client -- for the
6 patients that they were viewing and also the historical
7 knowledge about what happened prior to their purchase.

8 So, there can be no inadvertent disclosure under --
9 there can be no inadvertent disclosure under these facts. You
10 know, we know that they can access the documents now and have
11 seen that there are certain emails that could arguably be said
12 to be attorney/client privileged. And so, because of that,
13 they clearly have not taken the steps to stop it.

14 And, finally, your Honor, if you look at the timeline
15 here, this subpoena was served in January. This sale took
16 place three years ago. This is not something that arose at
17 the spur of the moment and people suddenly realized what
18 happened. This is well-known.

19 And I do want to be clear, because there seems to be
20 some confusion that the claim is that the Gideon firm did
21 something wrong that caused the waiver here. This was not the
22 Gideon firm. That was Specialty Surgery, the client, making
23 the decision to waive the privilege by selling it and not
24 protecting it during the sale process. That was the client's
25 decision, not the lawyer's decision, and the client can and

1 has waived the privilege here.

2 If the Court has any questions, I'm happy to address
3 them.

4 THE COURT: So, I had a question about the Tennessee
5 peer review privilege. So, the language in the *Powell* case
6 from the Tennessee Supreme Court seems quite strong that at
7 least that court, an authority on Tennessee law, concluded
8 that the proper course was to defer to the general assembly as
9 the author of the peer review privilege to determine if and
10 under what circumstances the privilege may be waived. So, why
11 should I as a district court in Massachusetts disturb that
12 decision by the Tennessee Supreme Court? Or you think I don't
13 have to?

14 MR. STRANCH: I don't think you have to. I mean, the
15 conceptual idea that's being pushed on the Court is that there
16 can be no waiver. We know that's not true. I can have a
17 document that's peer review privileged clearly and I can take
18 out a billboard and put it on it for the whole world to see
19 because I want to brag about how hard we're working to make
20 patient safety better. That's a clear waiver. Everyone can
21 see it, you know.

22 So, the question that the Court has to approach here
23 is --

24 THE COURT: But that's different than a court finding
25 a waiver.

1 MR. STRANCH: Well, you know -- and what we would say
2 is by giving the documents to third parties when they knew
3 that they would be potentially subject to discovery, they have
4 already waived it, and they're now attempting to retroactively
5 assert. We think that that is inappropriate. We think that
6 that does not meet the standards of *Powell* because it's a
7 different fact pattern.

8 And the key here, your Honor, is this is a true third
9 party. This isn't giving it to a related party. This was an
10 adversarial business that they were in competition with who
11 bought them out, and they have their own peer review
12 committee. They have their own methodology of handling these
13 documents. They have their own system that they followed for
14 protecting patient safety that is separate and distinct from
15 Specialty Surgery's. And so, Cumberland Medical Center no
16 longer -- has no interest in protecting what Specialty Surgery
17 did.

18 And, additionally, your Honor, the thing that's kind
19 of been forgotten here is the defendants have taken the
20 position throughout that Specialty Surgery no longer exists,
21 that they've dissolved it. So, how can Specialty Surgery
22 assert its privilege if it doesn't exist?

23 THE COURT: All right. Thank you.

24 Who is going to speak on behalf of the defendants?

25 MR. TARDIO: Good morning, your Honor. Chris Tardio

1 for the SSC defendants. Let me start by addressing a few
2 points that were raised in Mr. Stranch's argument.

3 And the Court asked, I think at the beginning of the
4 discussion, whether Cumberland Medical Center under the
5 protocol in place would be able to review the documents for
6 privilege before producing them to the plaintiff, and that is
7 true under the joint proposal, but I want to make clear that
8 the joint proposal doesn't include -- they would not be
9 reviewing them --

10 THE COURT: For you?

11 MR. TARDIO: Exactly, or for a privilege that we
12 hold. So, it would not catch any of the documents that we're
13 really concerned about.

14 I think in the discussions so far, we've either
15 intentionally or unintentionally conflated the three separate
16 privileges that we are talking about. Attorney/client --

17 THE COURT: I'm clear it's three separate ones and
18 that there are separate standards for waiver.

19 MR. TARDIO: Attorney/client, I candidly agree, is a
20 close call. I think --

21 THE COURT: I'm sorry, what?

22 MR. TARDIO: It's a close call on whether we waived
23 attorney/client --

24 THE COURT: Attorney/client, okay.

25 MR. TARDIO: I do think that under 502(b), the

1 elements of inadvertent disclosure have been met, and if you
2 look at the caselaw and the movement with 502(b) and the
3 caselaw that kind of was the precursor to 502(b), there's been
4 a movement toward -- or, really, a movement away from the idea
5 that once it's disclosed to a third party, that's an automatic
6 waiver, no matter the circumstances.

7 THE COURT: So, Mr. Tardio, what I don't understand
8 is why were these computers sold to Cumberland Medical?

9 MR. TARDIO: Well, as part of the asset sale,
10 because --

11 THE COURT: Right. But were they selling them in
12 terms of the hardware or the software? It's a little bit
13 confusing to me.

14 MR. TARDIO: My understanding is that they were sold
15 -- the hardware was sold because once they were put into use
16 -- and maybe counsel for Cumberland can shed some light on
17 this, but once -- there are seven computers at issue. My
18 understanding is that four remain in storage and have not been
19 touched until this process started. Three of them were put
20 into use at Cumberland Medical Center, but were re-imaged or
21 wiped before being put into use, and that is my understanding.
22 So, that would indicate to me that the sale was for the
23 hardware, not for the software, because Cumberland Medical
24 Center uses their own medical records, EMR system.

25 To answer your question, I believe it was because the

1 hardware is sold as part of the assets, but with --

2 THE COURT: But then, you know, with the argument
3 that you've made about password protected, it did seem from
4 the materials that -- I guess it's Cumberland Medical was able
5 to image the -- I guess it's a subset of the computer and to
6 run searches on them.

7 MR. TARDIO: I agree. I understand that, and that
8 gets to maybe even a more granular analysis. What can we --

9 THE COURT: And I am no computer expert, but that
10 sounded to me like the password didn't really serve its
11 purpose.

12 MR. TARDIO: Well, I don't think it would ever serve
13 its purpose in this setting to forever protect the data of the
14 -- think about it this way. We all have computers in our
15 office that are password protected. If I walk into Mr.
16 Krause's office and I take his computer, it's still password
17 protected, but if I take the hard drive out of it and hire a
18 third-party vendor, they're going to be able to access the
19 data. It's not -- the password is there. It's not -- I'm not
20 arguing that the password would forever protect the data from
21 being accessed.

22 We've all heard about the phone with the terrorists
23 and the criminals in California and Apple. Those phones, I'm
24 sure, were password protected, but people were still able to
25 access the data, but I think the reason the password is

1 important is because one of the elements or factors for
2 determining whether it was an inadvertent waiver is -- or
3 inadvertent disclosure is the reasonableness of the actions
4 taken on the front end to protect the data or protect the
5 privileged communications, and I think by placing a password
6 on the computer and on the account, basically, the email
7 account --

8 THE COURT: But if I understand correctly, the data
9 that was on these computers was searched, perhaps by your law
10 firm, to pull out material that you felt was relevant for
11 these lawsuits, but nothing else was done -- and, again, I'm
12 not being critical of anyone here, this is where we are -- to
13 otherwise remove any privilege or protected material.

14 MR. TARDIO: I'm not sure if I understand the Court's
15 question, but what I can tell the Court is that in April of
16 2013, before the asset sale happened -- and, again, as Mr.
17 Stranch referenced, we weren't involved in negotiating the
18 sale or drafting the documents for anything like that, but
19 before the asset sale happened, we went and captured the data,
20 knowing that it may be lost forever and knowing what our
21 preservation obligations are. So, that's the data we've been
22 searching. We haven't gone and searched these computers each
23 and every time we had to respond to discovery. We searched
24 the data -- or the drives that we imaged -- or the accounts
25 that we imaged in 2013.

1 So, we've talked about attorney/client privilege, and
2 I think based on the unrebutted affidavits we've submitted, it
3 was an inadvertent disclosure under 502(b). The factors, we
4 believe, weigh in favor of finding an inadvertent disclosure.

5 And the last factor, although it's not mentioned in
6 the text of the rule, it's mentioned in all the caselaw, is
7 whether the overriding interest of justice would or would not
8 be served by relieving the party of its error.

9 And I would ask the Court rhetorically, what
10 purpose -- what policy purpose is served in this case by
11 destroying a sacred privilege where some, frankly,
12 unsophisticated business people sold their assets. We are
13 going to destroy the attorney/client privilege when on the
14 Friday when these communications were sent with the
15 expectation of confidentiality, and we're going to punish the
16 client with a severe -- a severe sanction, or whatever you
17 want to call it, a severe finding, and I would think,
18 respectfully, that the interests of justice weigh in favor of
19 preserving the privilege and finding that this was an
20 inadvertent disclosure when all the factors are assessed and
21 the affidavit testimony is considered.

22 Now, respectfully, I don't think that work product is
23 a close call. That has not been waived. All of the caselaw
24 that I have looked at in preparing for this hearing, both from
25 the District of Massachusetts and beyond, is clear that

1 attorney work product protection is not waived nearly as
2 easily as attorney/client privilege. It is waived only when
3 the material is disclosed to an adversary or disclosed in a
4 way that it would be expected to get to an adversary. Here,
5 that did not happen. Some of the language that I've seen is,
6 "disclosed to an adversary or a conduit to an adversary."

7 THE COURT: Or inconsistent with keeping it from an
8 adversary.

9 MR. TARDIO: Exactly. This was -- if we assumed that
10 this was an intentional disclosure of attorney work product to
11 Cumberland Medical Center, it was not done to an adversary or
12 with the expectation that it would end up via subpoena power
13 three years later in this case's adversary's hands. So, I
14 don't believe that, frankly, it's even a close call that work
15 product protection has been waived.

16 The third separate privilege -- separate analysis is
17 the quality improvement privilege. I think the Court picked
18 up on the fairly plain language of the *Powell* case that says
19 you can't waive it. The policy that the legislature has set
20 out in this statute and underlying the protection is so
21 important and so powerful, that we're not going to let it be
22 waived with a judicial determination that it's been waived.

23 THE COURT: But at some point it starts to become a
24 little bit ridiculous. I certainly respect what the Tennessee
25 Supreme Court said here and, you know, they found it to be

1 appropriate in that case, but at some point -- and they did
2 acknowledge it could enable some parties to engage in
3 strategic behavior. I don't think that's what went on here,
4 but at some point it can become silly.

5 MR. TARDIO: I agree, but I don't think we're
6 anywhere near that point. If quality improvement information
7 was used as a sword, so to speak, or to benefit the party and
8 then the privilege was asserted in such a way that the
9 opposite party couldn't challenge that sword, then that would
10 be an inappropriate use and that may be an instance where
11 waiver could be found or if there were truly an explicit
12 intentional waiver of the privilege, that may be an instance
13 where even the *Powell* court would say, okay, this is silly.
14 They explicitly intentionally waived it. That's not what
15 happened here. It's not.

16 The plaintiffs are asking the Court to make a finding
17 that all these privileges have been implicitly waived by the
18 act of selling the computer. There has been no offensive use
19 of this information. There has been no explicit intentional
20 waiver where we have represented for our client or our client
21 represented on its own that we affirmatively waive the
22 privilege. The plaintiffs are asking the Court to find that
23 it's been implicitly waived by this voluntary sale of the
24 computers. So, I understand the Court's point about *Powell*.
25 I don't think we're anywhere near the silly stage, so to speak.

1 THE COURT: So -- and this had been discussed
2 earlier. There would be an easier road for you all if you had
3 argued that Cumberland -- potentially easier road for
4 Cumberland becoming a successor to Specialty Surgery, but am I
5 to understand you're not making that argument for purposes of
6 this motion?

7 MR. TARDIO: For purposes of this motion, we haven't
8 made that argument. I have not even analyzed that, and I
9 suspect that Cumberland Medical Center will likely not
10 voluntarily become our successor in interest or concede that
11 point, but I'll let them address that.

12 Let me make one last point. The *Solis* or *Solis*
13 case -- I think it's important for the Court to look at the
14 *Solis* case, because what the Court actually did in *Solis* or
15 *Solis*, however it's pronounced, is put in place a protocol or
16 a process like we've proposed which is to allow the party
17 asserting the privilege to review the material before it ends
18 up in the opposite party's hands and to lay out in a privilege
19 log any documents that they are withholding on grounds of the
20 privilege.

21 So, the *Solis* court did do what we're asking the
22 Court to do, and if you read the *Solis* opinion, the order from
23 the Court, it finds, as I read it, first, that the waiver
24 happened because the privilege log was insufficient or
25 inappropriate after multiple chances. These lawyers and this

1 party got to do a privilege log. Then the Court says -- and
2 we haven't heard anything from the party that says it hasn't
3 been waived by the sale. So, I don't know that the *Solis* case
4 doesn't cut both ways. In fact, it does cut both ways.

5 So, we would propose that the Court put in place a
6 process that allows us to review the documents after
7 Cumberland Medical Center does their review, any documents
8 that -- I think, practically speaking, how we propose this
9 happening is Cumberland Medical Center runs the agreed-upon
10 search terms that they will agree on with the plaintiffs.
11 They have a stack of documents that come back from the
12 searches. They review them for their own privilege
13 considerations and if they see a document that on its face
14 appears to be privileged or may be privileged, our privilege,
15 for instance, communication between us and Specialty Surgery
16 Center, goes into one stack and we review that stack and do a
17 privilege log, and if we need to come back about specific
18 documents, then we can, but we submit that that is the fairest
19 way to handle this issue at this point.

20 THE COURT: Now, with respect to Ms. Atkinson, did I
21 read your papers to be asserting a personal privilege on
22 behalf of her?

23 MR. TARDIO: I think she does. She was noticed in --
24 although she was not sued individually, she was noticed
25 individually. She was put on notice of an intent to sue her

1 individually, and we've represented her individually.

2 THE COURT: Has the statute of limitations expired
3 with respect to her?

4 MR. TARDIO: The statute of limitations is one year.
5 So, it's expired, and the statute of repose has expired.

6 THE COURT: Okay.

7 MR. TARDIO: I understand the Court's question, but
8 we have represented her individually, including in her
9 deposition.

10 THE COURT: So, I guess my -- with respect to -- I
11 understood that she was asserting a personal privilege, and I
12 was just wondering whether I had enough information to make
13 that call in the sense of don't I need to know whether or not
14 there was an email policy at SSC and what that said?

15 MR. TARDIO: I don't know that an email policy would
16 help, and I'm not sure I understand what the --

17 THE COURT: There are often cases that come before me
18 for individuals at corporations that assert an individual
19 right to assert a privilege, and a lot of that comes down to
20 what were their expectations with respect to using the
21 company's email.

22 MR. TARDIO: I'm told there was not an email policy.

23 THE COURT: Okay.

24 MR. TARDIO: So, if that is an important factor in
25 the Court's decision, we can get that fact into the record.

1 THE COURT: I'll accept your representation on that.
2 It would be more difficult if there was a policy. Then,
3 obviously, I would need to see it.

4 MR. TARDIO: I understand. And I think the Court can
5 reasonably conclude, if the Court accepts that there's no
6 policy, that the reasonable expectation in sending an email is
7 that -- it says "confidential" at the top and it's to your
8 lawyer, that it's going to remain confidential, particularly
9 in this case when it's under a password-protected account or
10 computer.

11 THE COURT: And what about the -- the claim that you
12 haven't told me that you -- whether or not you gave them the
13 actual passwords?

14 MR. TARDIO: I don't know the answer to that.

15 THE COURT: Okay.

16 MR. TARDIO: I know that when -- maybe Cumberland
17 Medical Center can answer this. My understanding -- and,
18 again, this is just my understanding. They may say it's
19 different -- is that when they access the accounts to look for
20 -- because we went to them and said, Hey, have these computers
21 been wiped? Is there any residual information on here that
22 may be privileged? They sent them to the vendor and I don't
23 think that the vendor used a password to access the materials.

24 THE COURT: That is not how the declaration is read,
25 in any event. It --

1 MR. TARDIO: Okay.

2 THE COURT: So, Ms. Hurt, did you want to comment on
3 anything?

4 MS. HURT: Yes, your Honor. Good morning.

5 Just quickly -- and I apologize for interrupting. On
6 this end the phone cuts in and out. So, if I cut in and out,
7 please just let me know.

8 First, regarding the legal successor in interest
9 argument, we do not acquiesce to that point and, in fact,
10 state that we are under Tennessee law not a successor in
11 interest in this case. I don't think that's really an issue
12 for this Court today, but I'm happy to articulate any points
13 on that, if needed, but if not, I'll just clarify some of the
14 statements that were made regarding these computers.

15 After the asset purchase agreement, this business did
16 not continue to operate and, therefore, the equipment that was
17 purchased was reallocated to other parts of our hospital
18 facility and, therefore, as a result, some of the computers
19 were used and placed in other parts of the hospital -- or
20 placed, I'm sorry, in our hospital, and as part of that
21 process, those were reallocated to have our business
22 information, our clients' HIPAA information, et cetera.

23 So, when we received the subpoena, our concern was,
24 one, that we were complying with HIPAA; and, two, that we
25 weren't being required to produce, now that these computers

1 were in use, our own work product, our own confidential
2 proprietary information.

3 The computers that we have looked at, we did not send
4 to a vendor. We have an IT department and that IT person was
5 able to do -- and I don't profess to be a computer person at
6 all. That's why Paul is in on this call with me. We just did
7 basically a word search for the attorneys' firms, for SSC or
8 buzz words that we thought might be something that could
9 potentially be privileged and protected. We had returns on
10 those buzz-word searches, and that's all we did. We have not
11 personally reviewed a single document for its content. We
12 only know that there are documents out there that contain
13 certain words that may or may not be applicable to this case,
14 your Honor.

15 As for password protected, I actually don't know the
16 answer to that. I know that our IT personnel were able to
17 image these computers and they did so, but the actual -- the
18 details of how they did that, I cannot say, your Honor.

19 Other than those points, the only thing that -- and
20 the only reason we're here on this phone, your Honor, is just
21 to make sure -- and the reason we worked so diligently with
22 SSC on this protective order is we want to make sure that
23 we're complying with HIPAA, and that's really the only concern
24 that we have, and we're willing to do whatever we need to, but
25 we needed some guidance from the Court.

1 And with that, your Honor, unless you have questions,
2 I don't think I have anything else to say.

3 THE COURT: So, Ms. Hurt, it sounds like from your
4 perspective with respect to the computers, that the purchase
5 was more about the hardware than the software. It doesn't
6 sound like you, so for example, were transferring patient
7 information that you were using. Or do I misunderstand?

8 MS. HURT: Yes, your Honor. If I may, I'm going to
9 defer to Paul, who is more familiar with the computers
10 themselves.

11 MR. WEHMEIER: Your Honor, Paul Wehmeier for
12 Cumberland Medical Center.

13 I would just note that the three computers that were
14 put back into service were re-imaged, and I think that would
15 go to the issue of whether or not we really were that
16 concerned about what was on the hardware before we received
17 it. We re-imaged those machines.

18 Now, I can't say that that imaging wiped those
19 machines. I've heard that representation made. I can't go
20 that far, but I can say that they were imaged such that we
21 could put them into use in our business applications as
22 opposed to just placing them back into service in the way we
23 received them.

24 MS. HURT: And, your Honor, I think maybe to clarify
25 the way you're using -- or the way I understand the term

1 "software," the Surgery Center had a different software than
2 what our hospital uses. So, to the extent that we purchased
3 those computers, it was for the hardware because our own
4 software had to be placed on them.

5 THE COURT: All right. And I -- you know, I'm not a
6 computer person either. So, it could be the software or the
7 information that was contained on the computers?

8 MS. HURT: Okay. Yes, your Honor. The information
9 -- the patients of the Surgery Center, when they -- or if they
10 became patients of the hospital, we did want to have access
11 for continuity of care to have those records available, is my
12 understanding, beyond those medical records of patients who
13 may become patients of the hospital. I don't know that any
14 other information was really part of the agreement. It was
15 the hardware and medical records, yes, your Honor.

16 THE COURT: All right. Thank you.

17 Anything further from the PSC?

18 MR. STRANCH: Yes, your Honor, I would like to
19 address a couple of points here quickly.

20 You just heard an important thing, which it is the
21 data on the computers that was important, not the software.
22 The hardware was useful --

23 THE COURT: And I may have confused it by saying
24 "software."

25 MR. STRANCH: It's fine. It's the data that they

1 need, and it's the data that we want searched so that we can
2 receive the documents.

3 You know, one of the problems we have here, your
4 Honor, is the imaging that Specialty Surgery did was in April
5 of 2013. The formulary modifications that are the subject of
6 this discovery occurred in April 2013. The sale occurred in
7 June of 2013. There's no image in June of 2013.

8 So, we have this window of time in which all the
9 documents were sold and all the data was sold to Cumberland
10 Medical and Specialty Surgery can't search during that period
11 of time to get that information for us.

12 And so -- I mean, point-blank, that appears to be a
13 violation of the Federal Rules on ESI because they've put it
14 beyond our control. It is concerning that three of the
15 computers have been re-imaged and we may have lost that data
16 forever. So, we may never be able to get to the bottom of
17 what happened with this formulary modification, but that's
18 what we're here about.

19 One thing that I would suggest to the Court about the
20 data and the importance, if I as a lawyer shut down my
21 practice and sell my computers and I don't wipe them first, I
22 can lose my law license for turning over that privileged
23 information. If they turned over HIPAA information that
24 they're not allowed to turn over, they could be subject to
25 civil and criminal penalties for doing so.

1 This was an intentional sale of the data, because you
2 heard the lawyer for Cumberland Medical say they needed the
3 data along with the computers, and there was -- and the burden
4 of establishing that they attempted to -- if you're going to
5 go the inadvertent disclosure route, establishing that they
6 attempted to remove all attorney/client privileged information
7 falls upon the defendant, and the defendant has offered
8 nothing to the Court to show that they attempted to remove the
9 attorney/client privileged information.

10 We believe it is all a pointless exercise to discuss
11 inadvertent disclosure because there's an unequivocal
12 voluntary waiver. If you take a look at the *Solis* case that
13 the defendants said here's what happened --

14 THE COURT: I've read the case.

15 MR. STRANCH: Okay. All right.

16 Well, the last thing that I would say is that we
17 believe that this is a voluntary waiver. It's very clear-cut.
18 If the Court has any concerns of whether it was a voluntary
19 waiver and whether we should receive the documents based upon
20 the reply and the affidavits that were filed late last night,
21 we would ask for an opportunity to respond to that. Any
22 specific questions --

23 THE COURT: I think I have more than enough briefing
24 on this case -- on this issue, anyway.

25 MR. STRANCH: Okay. Yes.

1 THE COURT: Mr. Tardio, anything else?

2 MR. TARDIO: I would be remiss if I didn't mention
3 the -- I hope that this is not too convoluted in the
4 discussion today. The local computers that were sold, the
5 seven computers, I think the record establishes that the
6 intent of that sale was to transfer the hardware, not the data
7 on there.

8 THE COURT: So, what about Ms. Hurt's -- it would
9 seem to me in the transfer of assets that the information from
10 SSC was important to Cumberland Medical and whether that
11 information was contained in paper files or electronic files,
12 it would make sense to me that that was part of the sale.

13 MR. TARDIO: It was part of the sale, but not these
14 seven computers. They separately sold the medical records
15 server and the hard copies of the medical records. The
16 medical records -- my understanding -- and I'm virtually
17 certain of this -- the medical records were not contained
18 locally on these computers, on the hard drives.

19 THE COURT: All right. Ms. Hurt or Mr. -- I'm sorry.
20 Is it *Wehmeier*? Do you have a different understanding?

21 MS. HURT: No, your Honor. And I wasn't trying to
22 confuse the issue. I was just trying to explain that we
23 bought the hardware, the computers. Any information that we
24 obtained about a patient's health was only after that patient
25 became -- well, a patient of the hospital, not of the Surgery

1 Center, but came to us as a patient. We went through the
2 channels to get their past medical records. I didn't mean to
3 imply that we got them off of those computers. I just know
4 that we had access to the records of Specialty for the
5 purposes of continuity of care.

6 THE COURT: Okay. Thank you. All right. I will
7 take it under advisement.

8 COURTROOM DEPUTY CLERK YORK: All rise. The Court is
9 in recess.

10 (Adjourned, 12:18 p.m.)

11
12 C E R T I F I C A T E

13 I, Catherine A. Handel, Official Court Reporter of the
14 United States District Court, do hereby certify that the
15 foregoing transcript, from Page 1 to Page 32, constitutes to the
16 best of my skill and ability a true and accurate transcription of
17 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In
18 Re: New England Compounding Pharmacy, Inc., Products Liability
19 Litigation.

20
21 August 11, 2016
22 Date

/s/Catherine A. Handel
Catherine A. Handel RPR-CM, CRR